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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 760

STATE OF IOWA, ET AL., PETITIONERS

*v.*

FEDERAL POWER COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 11-25) is reported at 178 F. 2d 421. The order and opinion of the Federal Power Commission dated December 19, 1947 (R. 5 (91),[1] 7 (243)) are reported at 6 F. P. C.

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[1] The printed record here is paginated as follows: all of petitioners' petition for review in the court below, consisting of 17 pages, is included as page 3; all of the record filed below by petitioners, consisting of pages numbered 1 through 235,

227 and 73 P. U. R. (N. S.) 85; the Commission's order of September 8, 1948 (R. 5 (106)) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 28, 1949 (R. 25). The petition for rehearing seasonably filed by petitioners (R. 27-42) was denied on January 20, 1950 (R. 43). The petition for a writ of certiorari was filed on April 17, 1950. The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act and under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission and the court below improperly failed to pass upon petitioners' contentions that (a) the Commission is without jurisdiction to grant a license to First Iowa Hydro-Electric Cooperative for the construction of a hydroelectric project on and along the Cedar and Mississippi Rivers in the State of Iowa, and (b) that First Iowa's failure to submit evidence of compliance with certain state laws under Section 9 (b) of the Federal Power Act constituted a bar to the issuance of a license to it.

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is included as page 5; the Commission's supplement to the printed record below, consisting of pages numbered 236 through 257, is included as page 7; the proceedings in the court below have not been assigned a single page number but are numbered consecutively 9 through 44. Accordingly, references to page 11 of the record filed below by petitioners, and to page 11 of the proceedings below, for example, will appear as (R. 5 (11)) and (R. 11), respectively.

2. Whether the court below erred in refusing to set aside the Commission's order granting a license on the ground that it had not been established that First Iowa's proposed project is economically feasible.

3. Whether the Commission erroneously denied effect to the Act of August 14, 1946, 60 Stat. 1080, 16 U. S. 661, *et seq.*, relating to the protection and conservation of wild life.

## STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Holding Company Act of August 26, 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

## STATEMENT

Petitioners here are seeking further review by this Court of the Federal Power Commission's (Commission) orders, approved below, for the issuance of a license to First Iowa Hydro-Electric Cooperative (First Iowa) for the construction of a hydroelectric project on and along the Cedar and Mississippi Rivers in Iowa. This license was issued after further proceedings before the Commission subsequent to this Court's remand in *First Iowa Hydro-Electric Cooperative* v. *F. P. C.*, 328 U. S. 152, No. 603, October Term, 1945.

A. *Proceedings Prior to Decision in* First Iowa *case:* On January 29, 1940, First Iowa filed with the Commission, pursuant to Section 23(b) of the Federal Power Act, a declaration of intention to construct a 15,000 kilowatt run-of-river hydroelectric project which would utilize the flow of the Cedar River, a tributary of the Iowa River, in Cedar and Muscatine Counties, Iowa, through a fall of about 35 feet. F. P. C. Docket No. DI-154. According to its usual practice, the Commission notified the State of Iowa of the filing of this declaration by letter dated February 7, 1940, addressed to its Governor (Tr. 3097),[2] but since it received no reply, did not advise the Iowa officials of the supplement to the declaration filed on April 2, 1941 (R. 7 (240)).[3] On June 3, 1941, the Commission entered its formal findings, a copy of which was sent to the Iowa Commerce Commission, in which it found that the Cedar and Iowa Rivers were navigable waters of the United States; that the proposed project would affect the navigable capacity of the Iowa and Mississippi Rivers and the interests of interstate commerce; and that a license for the construction proposed was required under the

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[2] References designated "Tr." are to the unprinted transcript which is on file with the Clerk of this Court.

[3] The supplement incorporated several additional features and, except for modifications here immaterial made at the suggestion of the Commission's engineering staff and of the Chief of Engineers, Department of the Army, proposed the project for which application for license was subsequently filed, *infra*, p. 5.

Federal Power Act (R. 7 (236, 238)). *First Iowa Hydro-Electric Cooperative,* 2 F. P. C. 958, 959, 960.

On August 11, 1941, First Iowa filed with the Commission, in a separate docket (F. P. C. Docket Project No. 1853), an application for a license to construct the project (R. 5 (1-6)).[4] The project as proposed and subsequently modified consisted of an earthen dam and dike across Cedar River about 21 miles above the junction of the Cedar and Iowa Rivers and about 49 miles above the mouth of the Iowa River, creating a reservoir of about 11,000 acres with usable storage capacity of about 72,000 acre-feet; a spillway section integral with the dam; a diversion canal approximately 8.5 miles long; a secondary dam and reservoir of about 920 acres on Mad Creek; a reservoir or forebay of approximately 160 acres created by the construction of a power dam across Geneva Creek overlooking the Mississippi River; a power plant consisting of four units aggregating 50,000 kilowatts capacity operating under an average net head of 103 feet, with two units having reversible pumping features and a tailrace 8,800 feet long parallel to the Mississippi River discharging into the pool below Navigation Dam No. 16 on that River (R. 5 (2-6)).

[4] Under Section 23(b) of the Act, no hydroelectric project which the Commission finds will affect the interests of interstate or foreign commerce can be lawfully constructed, maintained, or operated until a license for the project has been issued pursuant to an application therefor filed under Section 9 of the Act.

Petitioners, including the State of Iowa, intervened in the license proceeding objecting to the issuance of the license on the grounds among others (1) that First Iowa would not meet the requirements of Section 9(b) of the Act requiring submission of "satisfactory evidence" of compliance with the requirements of Iowa law since it had failed to secure a state permit for the project and (2) that the Cedar River was not a navigable water of the United States and therefore the Commission was without jurisdiction to grant the requested license (R. 5 (6-13, 28-39)).[5] The Commission, on January 29, 1944, dismissed First Iowa's application solely on the ground that it had not "presented satisfactory evidence, pursuant to Section 9(b) of the Federal Power Act, of compliance with the requirements of the applicable laws of the State of Iowa," but left the way open for First Iowa to renew the application within one year, upon satisfaction of these requirements (R. 5 (45)). *First Iowa Hydro-Electric Cooperative,* 4 F. P. C. 27, 32.

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[5] Chapter 363 of the Iowa Code, 1939 (now chapter 469, Code of Iowa, 1946) prohibited construction of a dam "in any navigable or meandered stream for any purpose, or in any other stream for * * * power purposes," unless a permit had been granted by the Iowa State Executive Council. Under the state statute governing action by the Council, it was provided that permit shall be issued only if it appears to the Council that, among other things, it "will not materially obstruct existing navigation * * * and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life."

After its petition for rehearing was denied by the Commission, First Iowa filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. In its petition for intervention which was allowed, the State relied only on the contention that First Iowa had failed to comply with Section 9(b) (No. 603, October Term, 1945, R. 37-39). The Court of Appeals affirmed the Commission's order (151 F. 2d 20) but this Court, on certiorari, reversed and remanded the case to the Commission, holding that Section 9(b) did not require showing of compliance with State law as a condition precedent to the issuance of a license. 328 U. S. 152. Although the State, in its brief in this Court, noted its contention that the Cedar River and the portion of the Iowa River here involved were non-navigable (see Brief for State of Iowa, Intervenor in No. 603, October Term, 1945, pp. 39-41), the Court approved the Commission's jurisdictional findings. 328 U. S. at 158-159, 163, see *infra,* p. 12. The State's petition for rehearing, strongly urging *inter alia* that the Court's opinion was "founded upon erroneous assumptions of fact and law that the Cedar River is a navigable water of the United States" (Pet. for Rehearing in No. 603, October Term, 1945, pp. 2, 4-11), was denied. 328 U. S. 879.

B. *This Proceeding:* Following the remand, the State, on June 28, 1946, petitioned the Commission to reopen the case for the presentation and con-

sideration of pertinent questions of law and fact, contending that the Commission lacked jurisdiction to license the proposed project because the Cedar River is non-navigable and, further, that if the Commission did assert jurisdiction it should take further evidence as to compliance with Section 9(b) (R. 5 (46-51)). The Commission, on August 6, 1946, ordered the record reopened but only for a further showing as to design and economic feasibility (R. 5 (52)).[6]

At the hearings before a Trial Examiner, which were confined to questions of design, economic feasibility and plans for financing, the State made an offer of evidence relative to the issue of jurisdiction which was rejected (R. 5 (220-222)). The Trial Examiner found that First Iowa planned to finance the entire cost of the project, which he found could reasonably be anticipated to be $23,000,000, by the sale of 40-year 4% revenue bonds, and that the project could be financed by the issuance of such bonds, amortized over a 30-year period, if the applicant had binding contracts for the sale of electric energy for a period of about ten years, with sufficient operating revenues assured to cover the estimated cost of operation, maintenance, reserves, and 133 per cent of the debt service (R. 5 (85)). The Examiner found, however, that First

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[6] The State's further petition to reconsider the Commission's jurisdiction was denied on September 24, 1946 (R. 5 (53-66, 67-70, 70-71)).

Iowa had no binding sales contracts, no assurance of such revenues, and no firm commitments for financing (R. 5 (85)), and concluded that "the issuance of a license is not justified by the record as it now stands" (R. 5 (86)).

The Commission heard oral argument on exceptions to the Trial Examiner's report (R. 5 (89)) and thereafter denied the State's petition to reconsider directed against the Commission's refusal to reconsider its jurisdiction (R. 5 (90)). The Commission, on December 19, 1947, authorized the issuance of a license for the project to First Iowa (R. 5 (91-94)), subject to the condition that the authorization would terminate within nine months, unless otherwise ordered by the Commission, if the Chief of Engineers and the Secretary of the Army failed to approve the project plans in accordance with Section 4(e) of the Act, and if First Iowa failed to submit satisfactory evidence of commitments to finance the project's construction (R. 5 (92)).[7]

Thereafter, on August 31, 1948, First Iowa advised the Commission that the Chief of Engineers and the Secretary of the Army had approved the project plans (R. 5 (97)). In compliance with the

[7] Iowa's petition for rehearing of January 19, 1948, addressed to the authorization of the license (R. 5 (94)) was denied by the Commission on the ground that since the authorization contained conditions precedent to the issuance of the license, none of which had been complied with, it was only an intermediate order dependent upon further order of the Commission to make it final (R. 5 (95)).

requirement of submission of satisfactory commitments to finance construction of the project, First Iowa submitted a letter from the Acting Administrator of the Rural Electrification Administration relative to the need and market for the power to be generated by the project (R. 5 (99))[8] and a letter from A. L. McDougal, Jr., President of McDougal & Condon, Incorporated, indicating that that firm would complete the financing program as soon as the license for the project was issued (R. 5 (98)).[9] Although the State protested that these

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[8] The Acting Administrator stated:

> This is in response to your request that we comment upon the possibilities of your supplying power to REA cooperatives in the area of your proposed hydro-electric development. As you know, the REA does not purchase electricity for its borrowers, but assists them in their negotiations with suppliers of energy and approves or rejects wholesale power contracts.
>
> Rural electric loads have increased greatly in the past few years and are expected to continue growing in the future. This is especially true in the area surrounding the proposed hydro development, load data for which have been made available to you. It is our opinion that a market for the sale of power to the REA cooperatives in the area exists and will exist in the future if energy is made available to our borrowers at sufficiently low cost.

[9] Mr. McDougal's letter reads:

> The primary purpose of this letter is to enable you to meet the requirements of the Federal Power Commission under its order of December 19, 1947 (Project No. 1853) that your Corporation submit satisfactory evidence of commitments to finance the construction of the project.
>
> As you know, with our consulting engineers, and your Co-operative, we have been engaging in negotiations with the Rural Electrification Administration to determine that administration's attitude toward the use of all the capacity and energy to be available at the project for a federation of Rural Electrification Administration Co-

letters did not comply with conditions of the order of December 19, 1947 (R. 5 (100-105)), the Commission, having previously concluded that "construction of this project would be beneficial to the area involved" (R. 7 (247)) and that the "applicant appears to be able to finance" (R. 7 (246)), on September 8, directed the issuance of a license to First Iowa to be effective as of September 1, 1948 (R. 5 (106-111)). In addition to the usual terms and conditions, the license was to require First Iowa to "construct, maintain and operate such fish protective devices and * * * [to] comply with such reasonable conditions in the interests of fish life as may be hereafter prescribed upon the recommendation of the Secretary of the Interior" (R. 5 (107-108)). The Commission denied petitioners' application for rehearing (R. 5 (111-149, 149)), and the court below denied their petition to set aside the Commission's orders (R. 3 (1-17), 11-25).

ARGUMENT

1(a). The *First Iowa* case (328 U. S. 152) disposes of petitioners' contention in regard to the Commission's jurisdiction to authorize the con-

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operatives, and we have satisfied ourselves that there will be a market for all of this energy and capacity. Accordingly, we feel that the obligations which your corporation can issue for construction purposes will be marketable.

When the license for the project shall have been issued by the Federal Power Commission, we will be glad to proceed with the completion of your financing program.

struction of the project here involved. In that case, this Court flatly stated (328 U. S. at 163):

> * * * For the purposes of this application it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, each of which has been determined to be a part of the navigable waters of the United States; will affect the interests of interstate commerce; will flood certain public lands of the United States; and will require for its construction a license from the Commission. *The project is clearly within the jurisdiction of the Commission under the Federal Power Act.* [Emphasis supplied.]

The question as to the existence *vel non* of Commission jurisdiction had to be decided before reaching the controversy as to the meaning of Section 9(b). If the Commission were without jurisdiction to license the project, there would have been no necessity for reaching the very difficult question of construction of Section 9(b), since the determination of its meaning in that setting would have been purely advisory. That the State of Iowa regarded this Court's statement in the *First Iowa* case as upholding the Commission's jurisdiction is amply demonstrated by its petition for rehearing in which it devoted eight pages to arguing that this Court had erred in apparently upholding the Commission's jurisdiction. The jurisdictional question having already been de-

cided by this Court, the Commission and the court below were plainly correct in refusing to reopen it.[10]

(b). The *First Iowa* case also disposes of petitioners' contention that the Commission's order directing the issuance of a license to First Iowa violates Section 9(b) of the Act by failing to require evidence of compliance by First Iowa with Iowa law. That precise question was before this Court in *First Iowa* and the Court's opinion makes it clear that Section 9(b), as it read it, did not require a showing of compliance with the provisions of Iowa law relied upon by petitioners as a condition precedent to the issuance of a license. See 328 U. S. at 162 *et seq. passim.* For example, the Court stated (328 U. S. at 170, 162):

> The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the

[10] The disposition of the jurisdictional question in the *First Iowa* case was, we submit, clearly sound. For even if it be assumed *arguendo* that the Cedar River is not navigable, as petitioners claim (Pet. 6, 16), the Commission nevertheless has jurisdiction to authorize the project by virtue of the navigability of the Iowa and Mississippi Rivers and the effect of the proposed project upon the navigability of those rivers and the interstate commerce thereon. Section 23(b); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 399, 401, 402; *Wisconsin Public Service Commission* v. *F. P. C.*, 147 F. 2d 743 (C.A. 7), certiorari denied, 325 U.S. 880; *Georgia Power Co.* v. *F. P. C.*, 152 F. 2d 908 (C.A. 5); cf. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508.

> absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.
>
> * * * * *
>
> * * * The Commission would have been justified in following its own interpretation of the Federal Power Act [that as to this project the requirements of Chapter 363 of the Code of Iowa have been superseded by those of the Federal Power Act] and proceeding with the merits of the application without requiring * * * [First Iowa] to submit evidence of its compliance with the terms of Chapter 363, or of any other laws of the State of Iowa, which the Commission held to be inapplicable or to have been superseded by the Federal Power Act.

2. Contrary to petitioners' contention (Pet. 25), the Act does not require, as a requisite to the granting of a license, that economic feasibility be demonstrated by a showing of firm selling contracts or firm commitments to finance construction. The Act's sole requirement as to economic feasibility is contained in Section 10(a), which provides that

> the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to the comprehensive plan for improving or developing a waterway or waterways for

> the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes * * *.

In its January 29, 1944, opinion accompanying the order dismissing First Iowa's application because of lack of compliance with Section 9(b), the Commission found (4 FPC at 29-30):

> * * * The present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable.

And in its December 19, 1947, order authorizing the issuance of a license upon certain conditions precedent, the Commission further found (R. 5(91)):

> * * * the proposed project is best adapted to a comprehensive plan for improving and developing the Cedar and Mississippi Rivers for the use and benefit of interstate commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

These findings clearly meet the requirements of Section 10(a), and since petitioners do not claim

that these findings are not supported by substantial evidence, they are conclusive here. Section 313(b) of the Federal Power Act; *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 145-146; *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 11, 130-131.

Findings as to other aspects of economic feasibility, including marketability of electricity and commitments to finance, are not statutory requisites to the issuance of a license. They are only factors, among others, which the Commission considers in determining whether, in the exercise of its broad discretion under the Act—a discretion which is at least as broad, if not broader than, its discretion to issue certificates of public convenience and necessity under the Natural Gas Act (cf. *Panhandle Eastern Pipe Line Co.* v. *F. P. C.,* 169 F. 2d 881 (C.A.D.C.), certiorari denied, 335 U.S. 854)—it should issue a license in the circumstances of the particular case. In the instant case, the Commission, in its opinion accompanying the December 19, 1947, order, recognized that no firm commitments as to financing the construction or sale of electricity could be obtained in advance of the actual license authorization (R. 7(245)), and conditioned its authorization on the furnishing within nine months of "satisfactory evidence of commitments to finance construction of the project" (R. 5(92)). First Iowa thereafter submitted a letter from the Acting Administrator of the Rural Electrification Administration relative

to the need and market for the power to be generated by the project (*supra,* p. 10, fn. 8) as well as a letter from McDougal and Condon indicating that it would complete the financing program as soon as the license was issued (*supra,* p. 10, fn. 9).[11] The Commission was plainly justified in accepting these letters as satisfactory evidence of commitments to finance the project in the light of its conclusion, which has not been questioned, that the limited disadvantages of the project brought to its attention would be far outweighed by the benefits which the project would confer—a peak load plant serving a very important function in supplying the power requirements of the area which, without the project, lacked any substantial hydroelectric "peaking" capacity (R. 7(247)).[12] In these

[11] The Trial Examiner's report recommending against issuance of the license on "the record as it now stands" (R. 5(86)) was filed on January 30, 1947, about a year and a half before the submission of these letters on August 31, 1948.

[12] The Chairman's dissent, referred to below (R. 23), recognized the "obvious potentialities of the project in a fully coordinated electric supply system" and indicated that, in his view, the Commission should grant First Iowa "a reasonable additional period—say ninety days—within which to perfect its showing in a more specific and definite fashion. The progress already made by Applicant indicates that this should not be unduly difficult" (R. 5(110-111)).

In this connection it is significant that Section 13 of the Act authorizes the Commission to terminate a license if the licensee fails to commence construction of the project within two years and in good faith and due diligence to "prosecute such construction." Accordingly, if First Iowa's financing should not be completed as proposed and it is unable to commence construction because of its inability to obtain financing from other sources within the specified time limits, its license may be terminated by the Commission.

circumstances, the court below clearly committed no error in refusing to set the Commission's order aside for lack of showing of economic feasibility (R. 24). See, *e.g., N.L.R.B.* v. *Stowe Spinning Co.,* 336 U.S. 226, 231; *N.L.R.B.* v. *Link-Belt Company,* 311 U.S. 584, 597; *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 146; cf. *Panhandle Eastern Pipe Line Co.* v. *FPC,* 169 F. 2d 881 (C.A.D.C.), certiorari denied, 335 U.S. 854.

3. Petitioners' final contention that the Commission failed to give proper effect to the requirements of the Act of August 14, 1946 (60 Stat. 1080, 16 U.S.C. 661) relating to the protection and conservation of wildlife (Pet. 14-15) "is, we think, without substantial merit" (R. 24).

The Iowa Conservation Commission was permitted to intervene in the license proceeding and was a party throughout. Mr. F. T. Schwob, its director, and Dr. Reeve N. Bailey of the Department of Zoology and Entomology of the Iowa State College, testified with regard to fish life in the area and the probable effect of the project thereon on the basis of actual surveys they made on the spot after receiving the Commission's notice (Tr. 1652-1851). They were given an opportunity to make any recommendations they desired in connection with the issuance of the license. Moreover, at the hearing following the remand, the Chief Biologist of the State

Conservation Commission testified, but was not prepared to make any further recommendations beyond those already been made (Tr. 3663-3672). The receipt of these views and recommendations plainly satisfied the requirement of Section 2 of the wildlife statute (16 U.S.C. 662) that the Commission "shall consult with * * * the head of the agency exercising administration over wildlife resources of the State wherein the impoundment * * * is to be constructed with a view to preventing loss of and damage to wildlife resources." This provision does not require that the recommendations of the State wildlife agency be adopted as condition precedent to the issuance of a Federal permit or license, but rather that "due consideration be given to the requirements of these [wildlife] resources as well as the requirements of such other resources as may be affected by those programs." H. Rep. No. 1944, 79th Cong., 2d sess., p. 3; see, also, S. Rep. No. 1698, 79th Cong., 2d sess., p. 3; S. Rep. No. 1748, 79th Cong., 2d sess., p. 3.

The further provision of Section 2, that the Commission consult with the Fish and Wildlife Service of the Department of the Interior, is amply satisfied by the terms of the license granted by the Commission requiring First Iowa to "construct, maintain, and operate such fish protective devices and * * * [to] comply with such reasonable conditions in the interests of fish life as may be here-

after prescribed upon the recommendation of the Secretary of the Interior" (R. 5(107-108)).

## CONCLUSION

The judgment below is correct and, in large part, simply echoes this Court's decision in the *First Iowa* case. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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